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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 103

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

OPINION BELOW

No opinion was rendered by the Police Court. The opinion of the United States Court of Appeals (R. 23–28) is reported in 84 Fed. (2d) 265.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 11, 1936, (R. 23). The petition for certiorari, filed June 8, 1936, was granted October 12, 1936. Jurisdiction to issue the writ is conferred by Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

On May 13, 1935, an information was filed in the Police Court charging that the respondent:

> On the 24th day of March in the year A. D. 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information, did * * * engage in the business of a dealer in second hand personal property, to wit, did then and there engage in the business of selling the return or other unused portions of railroad tickets, the same evidencing the right of the purchaser, holder or possessor thereof, to be transported by railroad from one state or territory of the United States, or from the District of Columbia to any other state or territory of the United States, or to the District of Columbia, without first having obtained a license so to do.

The respondent pleaded "Not Guilty" and demanded a trial by jury, which demand was denied and an exception noted. Upon a trial by the Court she was convicted and sentenced to pay a fine of $300 or, in default thereof, to serve a term of sixty days in jail.

Upon petition of the respondent, specifying several alleged errors in the trial of the cause, including the refusal to grant a jury trial, the United States Court of Appeals for the District of Colum-

bia allowed a writ of error. In its decision the Court found the other assignments of error to be without substance, but reversed the judgment of conviction upon the ground that respondent was entitled to trial by jury (R. 28).

On October 12, 1936, this Court granted a writ of certiorari.

QUESTION PRESENTED

The sole question is whether one charged with a violation of an Act of Congress, in the nature of a municipal ordinance, which provides a maximum penalty of $300 or ninety days, is entitled to trial by jury, notwithstanding the provisions of an Act of Congress prescribing summary trials in such cases.

SPECIFICATION OF ERRORS

The United States Court of Appeals erred:

1. In holding that the respondent was entitled to a trial by jury.

2. In holding that the offense of engaging in the business of a secondhand dealer without a license, as defined and punished in the License Act of the District of Columbia, is a crime within the meaning of the Constitution of the United States.

3. In holding that the Act of Congress which specifies petty offenses triable without a jury is unconstitutional.

4. In holding that the absence of an absolute right of appeal is a factor to be considered in determining whether trial by jury is required.

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PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

Article III, Section 2, Clause 3, of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *

Section 44 of the 1901 Code of the District of Columbia (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119), provides, in pertinent part, as follows:

> That prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

> In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury * * *.

The decision of the lower court, in effect, renders this Act of Congress unconstitutional.

Section 7 of the Act approved July 1, 1902 (32 Stat. 622, c. 1352), as amended by the Act approved July 1, 1932 (47 Stat. 550, c. 356), provides, in part, as follows:

> Par. 1. No person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license fee or tax is imposed by the terms of this section without having first obtained a license so to do. * * *
>
> Par. 39. Dealers in secondhand personal property, including the return or other unused portion of any ticket, order, or token purporting to evidence the right of the holder or possessor thereof to be transported by any railroad or other common carrier, however operated, from one State or Territory of the United States, or from the District of Columbia, to any other State or Territory of the United States or to the

District of Columbia shall pay a license tax of $50 per annum. Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer. * * *

PAR. 47. Prosecutions for violation of any of the provisions of this section, or of any paragraph added hereto from time to time by the Commissioners of the District of Columbia, or of any regulation made by the Commissioners under authority of this section, shall be on information in the police court of the District of Columbia by the corporation counsel of the District of Columbia or any of his assistants.

PAR. 48. Any person violating any of the provisions of this section, or additions thereto made from time to time by the Commissioners of the District of Columbia, where no specific penalty is fixed, or the violation of any regulation made by the commissioners under the authority of this section, shall upon conviction be fined not more than $300 or imprisoned for not more than ninety days.

SUMMARY OF ARGUMENT

The Constitution does not require the trial of petty offenses by jury. The character of such offenses is determined by reference to the procedure at common law.

At common law, prior to the adoption of the Constitution, there were many offenses, both in England and America, in the trial of which no jury was allowed. These included not only offenses punishable by fines, but others in which corporal punishment or imprisonment might be imposed.

The decisions of State courts, where similar constitutional restrictions are provided, support the position that an offense such as is here involved may be tried by summary procedure.

The License Law is in the nature of a municipal ordinance and Congress has properly treated a violation of the law as a petty offense.

The absence of an absolute right of appeal does not affect the right of trial by jury.

ARGUMENT

I

THE CONSTITUTION DOES NOT REQUIRE THE TRIAL OF PETTY OFFENSES BY JURY. THE CHARACTER OF SUCH OFFENSES IS DETERMINED BY REFERENCE TO THE PROCEDURE AT COMMON LAW

In *Schick* v. *United States*, 195 U. S. 65, where the court sustained the waiver of a jury in a trial where the maximum punishment was a fine of fifty dollars, the court declared that the provisions of the Constitution for trial by jury did not extend to petty offenses, saying (pp. 68, 70):

> The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes deter-

> mine whether it is to be classed among serious or petty offenses. * * *
>
> When the change was made from "criminal offenses" to "crimes", and made in the light of the popular understanding of the meaning of the word "crimes", as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

The test prescribed in the *Schick case, supra,* was qualified in *Colts* v. *District of Columbia,* 282 U. S. 63, 73, where the defendant was convicted in the Police Court of the District of Columbia of the offense of "Reckless Driving." This Court found that the offense was *malum in se* and was indictable at common law, and said:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense.

In *Callan* v. *Wilson,* 127 U. S. 540, the Police Court of the District of Columbia had tried a defendant charged with conspiracy and had refused his demand for a jury. The sentence which was actually imposed in this case was a light one; but under the common law which was then in force in the District of Columbia (Rev. Stat. Dist. Col., sec. 92; *State* v. *Buchanan,* 5 Harris & Johnson (Md.) 317, 360) conspiracy was punishable by im-

prisonment for more than one year at the discretion of the court (Rev. Stat. Dist. Col., secs. 1144, 1049; *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 34 App. D. C. 303, 305). This Court found that the offense was a crime indictable at common law, and said (p. 555):

> Without further reference to the authorities, and conceding that *there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury,* we are of opinion that the offense with which the appellant is charged does not belong to that class. * * * It is an offense of a grave character, affecting the public at large * * *. (p. 556) (Italics ours.)

In *Patton et al.* v. *United States,* 281 U. S. 276, 312, this Court said:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases *above the grade of petty offenses.* [Italics ours.]

To determine whether a given offense is within the class termed "petty offenses", and thus, under the Constitution, triable without a jury, reference must be had to the procedure at common law. In

Callan v. *Wilson, supra,* this Court declared that the provisions of the Third Article of the Constitution, relating to trial by jury are,

> to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.

This cardinal rule was reaffirmed in *Colts* v. *District of Columbia, supra,* where it was said:

> This provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury.

Similarly, in *Ex Parte Grossman,* 267 U. S. 87, 108, this Court said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.

It is clear, therefore, that petty offenses are exempt from the provisions of Article III which require trial by jury. Furthermore, it is certain, under the decision of this Court, that an offense, within the class of those offenses tried summarily at common law, is a "petty offense", and is not required under Article III to be tried by jury.

II

AT COMMON LAW, PRIOR TO THE ADOPTION OF THE CONSTITUTION, THERE WERE MANY OFFENSES, BOTH IN ENGLAND AND AMERICA, IN THE TRIAL OF WHICH NO JURY WAS ALLOWED. THESE INCLUDED NOT ONLY OFFENSES PUNISHABLE BY FINES, BUT OTHERS IN WHICH CORPORAL PUNISHMENT OR IMPRISONMENT MIGHT BE IMPOSED

Prior to the adoption of the Constitution Parliament had enacted a number of statutes for the trial of criminal offenses by justices of the peace without providing for the participation of juries, not only when fines were authorized but also when conviction might be followed by whipping or imprisonment. The statutes thus granting the power of summary conviction are discussed in Blackstone, Commentaries, IV, 280; Paley, Summary Convictions, Introduction; Webb, English Local Government: Parish and County, 419; Jenks, Short History of English Law, Eng. ed., 153, 154; Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 925, 929. Under such statutes, a servant who assaulted his master or overseer (5 Eliz., c. 4, Sec. 21), or a maker of false prophesies for the purpose of disturbing the realm (5 Eliz., c. 15) might be imprisoned for one year; anyone who cut growing grain or robbed orchards might be whipped (43 Eliz., c. 7); a silk-winder who embezzled goods committed to him might be whipped or set in the stocks (13 and 14

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Car. II, c. 15); anyone who maliciously injured trees might be put to hard labor in the house of correction for three months (1 Geo. I, Stat. 2, c. 48; 6 Geo. I, c. 16); men who lurked near the shore in order to aid smugglers might be committed to the house of correction to be whipped and kept at hard labor for not more than a month (9 Geo. II, c. 35, Sec. 18); one who removed rushes which had been planted to preserve sand hills was to be fined for the first offense, but for the second offense might be committed to the house of correction for one year, to be whipped and kept at hard labor (15 Geo. II, c. 33, Sec. 6); and vagabonds might be sentenced to imprisonment for six months, and an incorrigible rogue for two years, with whippings, (17 Geo. II, c. 5).

In the American Colonies and States there were many instances of laws for the trial of criminal offenses which did not provide for the participation of juries.

Thus, in New Hampshire the laws provided that many offenses were to be tried before one or two justices of the peace and said nothing whatever concerning juries in trials before those justices although the laws carefully provided for juries in trials before other tribunals. If any persons who had been convicted of adultery and sentenced to wear the capital letter "A" upon their outer garments were at any time found without the letter so worn, "they shall by warrant from a justice of the

peace be forthwith apprehended and ordered to be publicly whipped, not exceeding fifteen stripes." (Act of June 14, 1701, Laws of New Hampshire, compiled by A. S. Batchellor and successors, I, 676). Any Indian, negro or slave who was abroad in the night time after nine o'clock, unless upon an errand for his master, was to be sent by any justice of the peace to the house of correction, to receive the discipline of the house, and where there was no house of correction he was to be openly whipped by the constable, not exceeding ten stripes, (1714, Laws, II, 138). Justices of the peace might send vagrants to the workhouse, (1718, II, 266). Any negro, Indian or mullatto servant breaking a street lamp might be whipped ten stripes for the first offense and twenty stripes for a later offense, (1754, III, 72; see also V, 691). The disorderly celebrating of Guy Fawkes Day might be punished by imprisonment for forty-eight hours (1768, III, 514); and the disorderly celebrating of Christmas, gaming in public places or driving through the public streets of a town faster than five miles an hour, might be punished by imprisonment for forty-eight hours or setting in the stocks for two hours, (1771, III, 564); a grantor who refused to acknowledge his deed could be sent to prison without bail until he acknowledged the deed (1771, c. 12, sec. 32); rogues, beggars, persons using any subtle craft or unlawful games or pretending they could tell fortunes, common drunkards, common night

walkers, etc., were sent to the house of correction to be there kept *indefinitely* and required to work if able (1771, c. 61, secs. 2, 3; c. 87, sec. 7); a person assaulting a woman in the fields, streets, or lanes of a town, or defacing her attire or ornaments or attempting same could be tried by two justices of the peace and sentenced to ten stripes or committed to the house of correction for thirty days and required to furnish sureties (1771, c. 65, sec. 2). The laws authorized justices of the peace to impose fines for many offenses. In these trials without jury, if those who were fined did not pay the fine promptly the alternative punishments were often severe. For profanity one might be sentenced to ten days in jail (1747, III, 29; 1791, V, 651; for Sabbath-breaking, forty days (1785, V, 75); one who killed deer out of season might be sent to the workhouse for forty days for the first offense and fifty days for every subsequent offense (1740/1, II, 585; see also 1778, IV, 183); one who broke a street lamp and did not pay his fine within six hours after sentence might be punished by imprisonment for six months (1754, III, 72); the refusal to take oaths prescribed instead of the oaths of allegiance was tried by two justices of the peace who could impose imprisonment for three months upon failure to pay forty shillings and furnish security for good behavior and appearance at next quarter sessions (1771, c. 1, sec. 1); affrayers, rioters, disturbers or breakers of the peace and persons going about of-

fensively armed and making threatening speeches could be imprisoned until sureties for good behavior were furnished (1771, c. 11, sec. 5); one who published a lie or libel could be committed until a fine of twenty shillings was paid and sureties for good behavior furnished (1771, c. 11, sec. 6); and one who spoke against the war with Great Britain might be sentenced to six months imprisonment if he did not pay his fine (1777, IV, 75). The constitution of 1784, in section 15 of the bill of rights, provided that no one might be deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. There was no other provision for the trial of criminal offenses by jury.

After reviewing these laws, the Supreme Court in *State* v. *Jackson*, 69 N. H. 511, 518, observed:

> It will be noted that by these statutes, with the exception of the last one, the largest fine which a justice was authorized to impose was forty shillings, and the longest definite term of imprisonment was three months, authority being given in certain cases to imprison in the house of correction for an indefinite term; * * *. Jurisdiction of offenses punishable more severely was given to the court of quarter sessions, or some other court having a jury. Such was the state of the law on the subject in 1784, when the constitution was adopted.

In 1630 the Court of Assistants of Massachusetts Bay, which exercised legislative, executive and

judicial powers, ordered that justices of the peace were "in all things to have like power that justices of the peace hath in England for reformation of abuses and punishing of offenders; and that any justice of the peace may imprison an offender, but not inflict any corporal punishment without the presence and consent of some one of the assistants." (Records of the Colony of Massachusetts Bay, Shurtleff, I, 74). The Court itself punished a colonist who had been injuring Indians by sending him to the bilbowes, confiscating his property and sending him back to England. (Same, 75); a servant was whipped for misdemeanor towards his master (p. 81); a man was whipped for shooting at fowl on the Sabbath (p. 82); a man was whipped, had his ears cut off and was fined and banished for speeches against the government and the church of Salem (1631, p. 88); a man for attempted rape, swearing and breaking into a house was sentenced to a whipping of thirty stripes, a year's imprisonment at hard labor and coarse diet, and to wear an iron collar, (1636, p. 177); and other similar punishments were imposed (1631, pp. 90, 91, 92, 1632, pp. 99, 100, 101). During this period juries are noted only in a civil case (1631, p. 86) and in cases involving murder or manslaughter (1630, p. 81, 1637, pp. 202, 203). It was not until four years after the settlement that it was ordered that no trial should pass upon life or banishment but by jury or by the General Court (1634, p. 118; and

see p. 312). By Province Laws 1693, c. 9, Acts and Resolves, I, 122, a justice might "punish breakers of the peace, prophaners of the Sabbath, and unlawful gamesters, drunkards, or prophane swearers or cursers, by setting in the stocks, or putting into the cage, not exceeding three hours, or imprisonment twenty-four hours, or by whipping, not exceeding ten stripes, as the case may deserve, and where the offender has not wherewithall to satisfy the law in that case provided." It seems that where the laws provided for fine or alternative corporal punishment it was not always possible for the offender to avoid corporal punishment by paying the fine. (See also, for example, Laws 1705–6, c. 5, Sec. 6, Acts and Resolves, I, 573; Laws 1711–12, c. 6, Sec. 13, I, 679, 681). A justice might try and might fine or punish those who, for example, refused to serve in public office (1720, II, 185; 1731, II, 599; see also 1761, IV, 462; Act of May 8, 1781, c. 10); sold liquor without a license (1711, I, 679, 681) or to Indians (1765, IV, 763—forty shillings or three months); or demanded money when armed or at night time when accompanied by others or built a bonfire within ten perches of any building (1756, III, 997—forty shillings or one month). Persons who led idle or disorderly lives might be committed to the house of correction, to be kept at hard labor until discharged by order of the justice of the peace or by the sessions court (1699, I, 378; 1720, II, 182; 1731,

II, 579; 1770, V, 46) or might be sentenced to three hours in the stocks or to ten stripes (1770, V, 46). The Act of March 26, 1788, c. 21, p. 680, authorized one justice of the peace to send beggars, fortune-tellers, common drunkards and idle and disorderly persons to the house of correction, to be kept there until discharged by the overseers of the poor. For the second offense of profanity one might be placed in the stocks or whipped (1731, II, 700). An Act of 1777 (V, 626), which authorized a justice of the peace to commit a deserting soldier and notify his commanding officer but did not authorize any fine, stipulated that if the offender were unable to pay such fine the justice might sentence him to thirty-nine lashes for each offense. Two justices might try one who wilfully broke a street lamp and fine him five pounds for the first offense and ten for the second; if he did not pay the fine within six hours he might be imprisoned for six months (1753, III, 645). Under the same law a negro, Indian or mulatto servant who broke such a lamp might be whipped ten stripes for the first offense and twenty for any later offense. (Compare 1774, V, 301, where the fine was raised to twenty pounds and the trial was transferred to the court of general sessions). By Act of March 15, 1785, c. 33, p. 263, one justice of the peace might try a person accused of larceny provided the treble value of the property stolen did not exceed forty shillings and might sentence the offender to pay a fine of forty

shillings or to be imprisoned for twenty days and to make satisfaction. And by Act of February 28, 1787, c. 16, pp. 579, 586, a justice might fine an innkeeper for keeping gaming implements or permitting dancing or suffering anyone to drink to excess in his house, and if the fine were not paid, might sentence him to a public whipping of fifteen stripes. Several of the above laws were enacted after the state constitution, adopted in 1780, had provided in the Declaration of Rights, Article 12:

> No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

In New York prior to 1732 there seems to have been no offense punishable by a justice which might not have been atoned by the payment of a fine except that where a servant sold a commodity during the time of his service, two justices might impose either fine or corporal punishment (1665, Colonial Laws of New York, I, 47), and that if a mayor or two justices of the peace decided that a person was a vagrant they might order his or her transportation to place of birth or out of the prov-

ince, and in case of a return order retransportation from constable to constable, with lashings on the bare back by each constable (1721, Same, II, 56). In 1732 there was enacted further legislation (II, 745) which was broadened in 1744 into the provisions that when any person who was charged with any offense under the degree of grand larceny was unable to give bail to appear at the next general sessions, he might be tried and sentenced to corporal punishment, the trial being by three magistrates of the class named if within the city of New York and by three justices of the peace if elsewhere in the colony (1744, III, 377, 379). From 1732 down to the Revolution there is abundant resort to prosecutions for the enforcement of laws relating to fishing, hunting, Indians, hawkers and peddlers, liquor, adulteration of food, with penalties as high as fifty shillings, and, in default, imprisonment for six months at hard labor. Many of these laws provided for imprisonment for three months in default (See 39, Harvard Law Review, 925 et seq). In 1755 the mayor, recorder, or a single justice could fine one convicted of selling liquor to Indians fifty pounds or impose imprisonment, in default, for six months (4 Col. Laws 1096). In 1772 one convicted of selling lotteries could be fined double the amount of the lottery, and if this could not be ascertained, five hundred pounds, or, in default, imprisonment until payment (5 Col. Laws). The constitution of 1777

(Art. XLI) provided that "trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." Nevertheless an Act of 1785 (c. 40) authorized the mayor, recorder, and aldermen of New York City to commit to the house of correction for not more than six months anyone whom they might theretofore have sentenced to corporal punishment, and to commit any vagrant or prostitute to the house of correction for a similar term; an Act of 1787 (c. 15, Sec. 21) authorized a majority of inspectors at any election to jail for thirty days any person who was guilty of disorderly conduct at any election or used corrupt means to influence any elector; and in 1788 (c. 31) the legislature authorized any justice to commit any disorderly person to the house of correction, at hard labor, for two months or hold him for the next general sessions, which might commit him to the house of correction for six months, with whippings. Such statutes did not deny trial by jury in cases in which it had been used at the time of the adoption of the constitution. A statute similar to that of 1744—by which three justices tried without a jury a man who was accused of petty larceny and was unable to give bail—was sustained in *Murphy* v. *People*, (1824) 2 Cow. 815; see also *Duffy* v. *People*, (1843) 6 Hill, 75, 78. And in *People ex rel. Murray* v. *Justices*, (1878) 74 N. Y. 406, the Court of Appeals sus-

tained a statute under which a defendant charged with assault and battery elected to be tried by such a court, without a jury, was convicted and was sentenced to imprisonment for four months. The statutes, however, did not give the court jurisdiction to try for an offense where a sentence to imprisonment for more than one year might be imposed. *People ex rel. Cosgriff* v. *Craig,* (1909) 195 N. Y. 190.

In Pennsylvania the Body of Laws (1682, Pennsylvania Charters and Laws, 107 et seq.) provided for trial by jury in "criminal matters of life" (p. 117), but it also provided that any servant assaulting or menacing his master or mistress should be punished at the discretion of two justices of the peace, "so it be suitable to the nature of the offense" (p. 113); that for clamorous scolding a justice of the peace should commit the offender to the house of correction for three days (p. 115; see also p. 198), and that profanity and drunkenness should be punished, apparently after hearings before a justice of the peace (see 1683, p. 133), by fines ranging up to ten shillings, or, at the discretion of the justice (p. 121), by imprisonment in the house of correction at hard labor ranging up to ten days (pp. 108, 109, 110). Similar punishments for profanity might be assessed by one justice of the peace under an Act of 1702 (Stat. at L. of Pa., II, c. 44). In 1700 (II, c. 21) it was enacted that "where the fine doth not exceed twenty

shillings one or more justices of the peace * * * may determine and give judgment * * * and may commit the offender to prison as the law shall direct * * * except where the law leaves the fine to the discretion of the county court". An Act of 1766 (VII, c. 534, Sec. 12) empowered any two magistrates in Philadelphia to commit disorderly persons to the workhouse for three months. Section 12 authorized one magistrate to commit a vagabond for three months. An Act of 1767 (VII, c. 552) authorized any justice of the peace of the City of Philadelphia or named adjoining townships, upon due examination and proof, to sentence any disorderly persons or vagabonds without visible means of subsistence to the house of employment to be kept at hard labor for not more than one month. Another Act passed on the same day (VII, c. 555) authorized any justice of the peace outside of Philadelphia and of the townships named to impose a similar punishment upon disorderly persons but allowed an appeal to the court of general quarter sessions in such cases. By an Act of 1771 (VIII, c. 621, Sec. 4) any person who had erected an obstruction to the passage of fish in certain streams could be either fined five pounds or imprisoned for three months. The state constitution of 1776 provided (Declaration of Rights, Sec. 9) "That in all prosecutions for criminal offenses, a man hath a right to * * * a speedy public trial, by an impartial jury of the country,

without the unanimous consent of which jury he cannot be found guilty;" and (Frame of Government, Sec. 25) "Trial shall be by jury as heretofore." By acts of 1777 (IX, cc. 737, 739) all laws which were in force on May 14, 1776, were continued in force, and justices of the peace were given the same powers and jurisdiction as they had theretofore possessed.

In Maryland an Act of 1638/9 (Maryland Archives, I, 53) authorized the Lieutenant General or any one of the council having commission for the peace to hear and determine as any justice of the peace in England might do the following cases in addition to those in which fines were authorized: drunkenness, punishable by whipping or other corporal punishment; fornication and adultery, public whipping or fine; refusal of servant to perform lawful command, whipping or other correcting at the discretion of the justices. This Act also authorized any justice of the peace to imprison any person, until he furnished sureties, who threatened the person or goods of another, or resided among the Indians without the consent of the Lord Proprietary, or who refused to properly care for his servants. The colony naturally punished the misconduct of slaves by inflicting physical pain rather than by fines. The justices were authorized to try and order whippings for any slave who carried a gun off the lands of his master without license from his master (1704, 26 Archives, 261), who stole or

committed any other crime or misdemeanor (1717, 33 Archives, 112), or who harbored other slaves (1748, Maryland Session Laws, 21); while a negro who struck a white man might have one of his ears cropped, (1723, 34 Archives, 732). Any constable might whip, not over thirty-nine lashes, any slave whom he found attending an unlawful meeting, and might do this without proceedings in any court (1723, 34 Archives, 731). Any person, free or slave, who navigated a sloop unlawfully carrying tobacco might be given thirty-nine lashes (1747, Maryland Session Laws, 9; 1753, Session Laws, 2). Persons found in a county other than their own without a pass could be committed by any justice of the peace until they could satisfactorily explain their presence or until they were claimed by their masters, but not longer than six months (1715 Laws of Maryland—Kilty, c. 44). An Act of 1709 provided that persons imprisoned for vagrancy could not be held more than six months (27 Archives, 472). By Acts of 1725, 1747 and 1790 any person who set up a booth and sold liquor within a certain distance of a Quaker meeting house could be committed by a justice of the peace to the public prison of the county until he removed the booth and furnished security for his appearance at the next session of the county court (Laws—Kilty, c. 6; c. 17; c. 15). Within certain named counties, any justice of the peace was authorized to commit rogues, vagrants, vagabonds, beggars and other idle, dis-

solute and disorderly persons, found wandering in the county, to the workhouse for three months at hard labor (1768, c. 29—Laws—Kilty). Similar Acts were passed for other counties subsequently (1773). The Maryland Constitution of 1776 provided in its Declaration of Rights (Sec. 3) "That the inhabitants of Maryland are entitled to the common law of England and the trial by jury according to the course of that law;" (Sec. 19). "That, in all criminal prosecutions, every man hath a right * * * to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty;" and (Sec. 21) "That no free man ought to be * * * deprived of his life, liberty or property but by the judgment of his peers or by the law of the land." And yet the laws of 1780, June session, c. 14, Sec. 77, provided that any free man making a fire in or near a public tobacco warehouse should be fined six hundred pounds of tobacco and any servant or slave so doing should by order of any justice receive on his bare back not more than thirty-nine lashes (see also Sec. 89); by Session Laws, 1785, c. 29, Sec. 5, if any person suffered any servant or slave to kill a wild deer contrary to the act he was to be fined ten pounds, and if any servant or slave killed such wild deer without the knowledge of his master he was to receive not more than thirty-nine lashes at the discretion of the justice of the peace. The laws permitting commitment for three months of vagrants,

vagabonds, etc., (1768, supra,) were extended to other counties, and in 1788 the same power was granted justices of the peace of Caroline County and the period of commitment increased to six months (Laws—Kilty, c. 14).

It may be pertinent to observe at this point that by Act of Congress approved February 27, 1801 (2 Stat. 107), the laws of the State of Maryland were continued in force in the District of Columbia (Sec. 1), and justices of the peace were to "have all the powers vested in, and shall perform all the duties required of, justices * * *, as individual magistrates, by the laws hereinbefore continued in force * * * in said district, * * * in all matters, civil and criminal, and in whatever relates to the conservation of the peace" (Sec. 1).

In North Carolina By-Laws 1770, c. 10, Sec. 2, 23 Rec. at 802, if anyone were convicted before a justice of the peace of hunting with a gun in the night time by fire light, the justice might impose a fine and "order such offender to have and receive thirty-nine lashes, on his bare back, well laid on." By-Laws 1777, c. 21, 24 Rec. 33, if a justice found the accused guilty of night hunting he might require the convict to serve as a continental soldier for three years unless he immediately procured an able-bodied and effective substitute to serve for that term. By-Laws 1778, c. 2, 24 Rec. at 158, anyone convicted before a justice of the peace of being a vagabond might be sentenced to serve in the con-

tinental army, and anyone convicted before two justices of harboring a deserter might be sentenced to serve in the continental army for three years if he were able-bodied; and if he were not sufficiently able-bodied to serve as a soldier he might be fined fifty pounds and sentenced to imprisonment for three months. By-Laws 1780, c. 7, 24 Rec. at 325, if two justices of the peace found that any person supported himself for the most part by gaming, they might require security that he would not bet anything whatever for the term of twelve months. And Laws 1784, c. 34, 24 Rec. 597, punished gaming by imprisonment, involuntary servitude and, where necessary, by thirty-nine lashes on the bare back for each offense. (See also Laws 1764, c. 4, 23 Rec. 611). Several of these laws were enacted after the North Carolina Constitution of 1776 had provided in Article 9 of the Declaration of Rights,

> That no free man shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

Volumes 18 and 19 of the Colonial Records of Georgia contain legislation of that colony and state down to 1880 which authorized trial for offenses without jury. (See Georgia Justice of the Peace, title "Conviction"). Such was the Act of February 29, 1764, 18 Rec. 588, for the punishment of vagabonds and other idle and disorderly persons—an act which authorized imprisonment up to three

months or whippings up to one hundred stripes. Such was the Act of February 21, 1785, 19 Rec., pt. 2, at 424, under which any white person guilty of fast driving in Savannah was to be fined without trial by jury and any slave might be given thirty-nine lashes. Without jury trial fines of five pounds might be imposed on those who damage roads (March 7, 1755, 18 Rec. at 95), sold liquor to Indians without licenses (July 23, 1757, 18 Rec. at 223), built wooden chimneys (March 27, 1759, 18 Rec. 313), took any material from fortifications (April 24, 1760, 18 Rec. at 415), sold liquor to slaves without the consent of their owner (Dec. 24, 1768, 19 Rec., pt. 1, at 79), hunted deer at night by fire light (Sept. 29, 1773, 19 Rec., pt. 1, 288), or who, as church warden, failed to inspect slave owners who attended church and prosecute those who came unarmed (Feb. 27, 1770, 19 Rec., pt. 1, 137).

In New Jersey the Vagrancy Acts of 1748, 1754 and 1774 gave a single magistrate power to convict and to commit to prison at hard labor for one month and to punish escape from such commitment with six additional months of hard labor and thirty-nine lashes (Allison, 1775 Laws of N. J.). Scores of infractions of laws concerning the liquor traffic, gambling, hunting and fishing, highways and rivers, and weights and measures were intrusted to justices of the peace. Up to forty shillings, penalties were recovered before a magistrate without jury but with a right to summary review

by the justices in the court of sessions; above forty shillings the defendant could ask for a jury of *six* men, from whose verdict there was no appeal (39 H. L. R. 925 et seq.). The constitution of 1776 provided that "* * * the inestimable right of trial by jury shall remain confirmed as a part of the laws of this colony, without repeal, forever" (Art. XXII). In 1844 the new constitution provided that "trial by jury shall remain inviolate." In *Johnson* v. *Barclay,* 1 Harrison 1, 6, reviewing a conviction by magistrate for swearing, the court said:

> Convictions before a justice, were in practice in this State, long before the court was formed—* * * trial by jury was not introduced as a new mode of trial, in all cases,—it was adopted, or rather continued, as it was then used in England and in this colony, and was not at that time, either there or here, resorted to in cases of summary proceedings and convictions for petty offenses.

Justices of the peace in Colonial Virginia possessed powers similar to those in the other colonies. A single justice could convict a person of gaming, fine him five pounds, or commit him to jail until he furnished security for good behavior for twelve months (18 Geo. II, c. 5, Sec. 3). Any justice could fine one who killed deer out of season fifteen shillings for each deer or commit him to jail in default (8 Geo. II, c. 12, Sec. 1). One who peddled

without a license could be fined twenty shillings by a single justice or, if not paid, order thirty-nine lashes (32 Geo. II, c. 13, Sec. 5). Later this was changed to a fine of five pounds or, in default, thirty-nine lashes (3 Geo. III, c. 14, Sec. 2). Papists who kept arms after refusal to take oath of allegiance were committed for three months, their arms forfeited, together with treble their value (29 Geo. II, c. 4, Sec. 4—1756). The same penalty was imposed for knowing and failing to disclose such keeping of arms (Sec. 5), and for harboring and concealing a horse of such papist (Sec. 9).

Section 8 of the Virginia Declaration of Rights of 1776 provides:

> That in all capital or criminal prosecutions a man hath a right to * * * a speedy trial by an impartial jury of his vicinage without whose unanimous consent he cannot be found guilty * * * that no man ought to be deprived of his liberty except by the law of the land, or the judgment of his peers.

Subsequently, a single justice was empowered to order a vagrant to be bound out to labor for three months (Laws 1787, c. 48), and by Section 18 persons operating gaming tables were treated as vagrants. By Section 14 a vagrant in a town could be committed to the workhouse for three months by two magistrates of the corporation. This Act also enabled a single justice to inflict twenty lashes

on disorderly persons and to imprison them for three months or to bind them out for labor for that time.

A brief review of summary trials at common law may be found in the dissenting opinion of Justice Brandeis, concurred in by Chief Justice Taft and Justice Holmes, in the case of *United States* v. *Morland,* 258 U. S. 433, where it was said (p. 445):

> Confinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period, at the time of the adoption of the Constitution and since, for offenses not deemed serious—that is, for delinquencies as distinguished from serious crimes. Thus by the Great Law of the Province of Pennsylvania of December 7, 1682, the penalty for clamorous scolding, railing or lying was three days' imprisonment in the house of correction at hard labor; for cursing, playing at cards or dice, and for the first offense of drunkenness, it was five. For stage plays, bull baiting and cock fighting, it was at least ten. And for dueling it was three months. The duty to establish such a house "for restraint, correction, labour and punishment" was imposed upon every county of Pennsylvania at the same time. A similar law had been enacted in Plymouth Colony in 1658; in Massachusetts Colony earlier; and like provision was made in other colonies. By the Law of New York of February 9, 1788, c. 31,

> confinement in the house of correction at hard labor was prescribed as the punishment for all disorderly persons. And those "who threaten to run away and leave their wives and children to the city or town" were classed as disorderly persons, with vagrants, beggars, idlers, fortune-tellers and common prostitutes. The period of imprisonment, limited ordinarily to sixty days or until the next general sessions of the peace, could be extended by the general sessions for a further period of six months. In the counties or cities in which there was no workhouse (bridewell) or house of correction, the jails were to be used and considered as such. A single institution often served as almshouse, insane asylum, workhouse, house of correction and jail. *And under all of these laws commitment to the workhouse at hard labor was made by a judge, justice of the peace, or magistrate, without presentment or indictment of a grand jury.* [Italics ours.]

There the Court considered and decided the question of what imprisonment amounts to infamous punishment. Considering the same question in *Ex Parte Wilson,* 114 U. S. 417, this Court observed (p. 427):

> And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases "where no other punishment than whipping, not exceeding

> thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act of September 24, 1789, ch. 20, par. 9; 1 Stat. 77.

III

THE DECISIONS OF STATE COURTS, WHERE SIMILAR CONSTITUTIONAL RESTRICTIONS ARE PROVIDED, SUPPORT THE POSITION THAT AN OFFENSE SUCH AS IS HERE INVOLVED MAY BE TRIED BY SUMMARY PROCEDURE

In *Bray* v. *State* (1903), 140 Ala. 172, a defendant was denied a jury in a prosecution for violation of an ordinance which punished failure to pay hack fare. He was convicted and sentenced to six months at hard labor. Trial without jury was sustained.

In *State* v. *Parker* (1924), 87 Fla. 181, an ordinance forbade anyone to operate an automobile while intoxicated, under penalty of imprisonment for not less than thirty nor more than sixty days for the first offense. The defendant was tried by the municipal court without the right to trial by jury. He was found guilty and sentenced to imprisonment for thirty days. Trial without jury was sustained, and the Court said:

> Sec. 3 of the Declaration of Rights in our Constitution, providing that "The right of trial by jury shall be secure to all, and remain inviolate forever," was never intended to *extend* the right of jury trial, but merely

> secures it in the cases *in which it was matter of right before the adoption of the Constitution.* Trials in Municipal Courts for infractions of municipal ordinances were conducted generally without juries prior to the adoption of our Constitution, and, therefore, do not fall within the constitutional guarantee; and offenders against such ordinances are not entitled to a jury trial in such courts. (Citing cases.)

In *State* v. *Glenn* (1880), 54 Md. 572, an habitually disorderly person was tried without a jury and sentenced to six months in the house of correction. In sustaining the conviction, the Court said (p. 600):

> In England, notwithstanding the provision in the Magna Charta of King John, Article 46, and in that of 9 Hen. 3, Ch. 29, which declares that no freeman shall be taken, imprisoned or condemned, "but by lawful judgment of his peers, or by the law of the land", it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses; and this jurisdiction has been largely increased and extended in modern times, as will be seen by reference to Burn's Justice, Tit. Conviction; Bacon's Justice Abr., Tit. of the Peace and Paley on Summary Convictions.

The Court (p. 601) quotes with approval from 4 Blackstone Com. 280, as follows:

> Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts, and *corporal* penalties denounced by Acts of Parliament for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others * * *.

In referring to the approved practice of summary jurisdiction in England, the Court said (p. 602):

> At present, in England, the various offenses falling under the heads of idle, vagrant, and disorderly persons, and made subject to the summary jurisdiction, are defined and classified, and the punishments prescribed by statute, 5, Geo. 4, Ch. 83, as amended by statutes 1 and 2 Vict. Ch. 38; 31 and 32 Vict. Ch. 52, and 32 and 33 Vict. Ch. 99; an analysis of which is given in 2 Broom and Had. Com. 476. The punishment prescribed in those Acts is imprisonment at hard labor. The exercise of summary jurisdiction, therefore, is not, in England at least, regarded as being in violation of the fundamental guarantees of the rights and liberties of the people; and the personal liberty of the subject at this day is as well and jealously protected in England as in any other country, where the principles of

> Magna Charta and of the common law are enforced.

In *Lancaster* v. *State* (1899), 90 Md. 211, a statute authorized police justices to try for assaults without jury. The statute was held valid. The sentence was eighteen months imprisonment. See also *State* v. *Loden,* 117 Md. 373.

In *State* v. *Broms* (1918), 139 Minn. 402, the defendant was prosecuted under an ordinance for disorderly conduct, was convicted and sentenced to hard labor for ninety days. The Court held that he was not entitled to a jury trial. In *State* v. *Anderson* (1925), 165 Minn. 150, the Court decided that one who was accused of selling intoxicating liquor unlawfully in violation of an ordinance was not entitled to trial by jury. In that case the defendant was sentenced to imprisonment for ninety days.

In *Bell* v. *State* (1920), 104 Neb. 203, and *State* v. *Kacin* (1932), 241 N. W. 785, 123 Neb. 64, a State law forbade the possession and transportation of intoxicating liquors. Magistrates and police courts were empowered to try without jury all violations of that act and all violations of ordinances where the penalty did not exceed a fine of one hundred dollars or imprisonment for three months. The statute was sustained, and in *Bell* v. *State* the Court said (p. 205):

> At that time the misdemeanors now under consideration were not recognized by the

common law or by any statute then in existence. New misdemeanors and modes of trial therefor are proper subjects of legislation. The better view seems to be that the legislature acted within its powers in declaring possession and transportation of intoxicating liquors to be misdemeanors, and in providing for the trial of violators of the law before magistrates and police courts without a jury where the penalty does not exceed a fine of $100 or imprisonment for three months. While the decisions of the courts are not in harmony on this question, the conclusion reached is supported by the soundest reason. *Inwood* v. *State,* 42 Ohio St. 186; *Kirkland* v. *State,* 72 Ark. 171; *Van Swartow* v. *Commonwealth,* 24 Penna. Stat. 131; *Tims* v. *State,* 26 Ala. 165; *Commonwealth* v. *Andrews,* 211 Penna. St. 110; *Goddard* v. *State,* 12 Conn. 448; *State* v. *Kennan,* 25 Wash. 621.

In *State* v. *Ruhe* (1898), 24 Nev. 251, in *quo warranto* proceedings the court sustained a statute which provided that trials for the infraction of ordinances of a police nature should be summary in character before the police judge without a jury. By statute the jurisdiction of the police judge included cases in which he might impose fine or imprisonment or both.

In *People* v. *Harding* (1921), 189 N. Y. Supp. 657, it was held that one who is accused of vagrancy is not entitled to trial by jury even though

upon conviction he might be sentenced to three years in a correctional institution or to one year in a jail or penitentiary. The Court said:

> As the evidence offered leaves no doubt as to her guilt, the only question left for consideration is whether or not the demand for a trial by jury was properly denied. As the power to punish vagrants under the Code of Criminal Procedure was greatly enlarged by Chapter 502 of the Laws of 1919, and as it is now possible under Section 891a to impose a sentence, not exceeding three years, to a correctional institution, or to a jail, penitentiary, or other penal institution for a period not to exceed one year, it is urged that, as the punishment now provided is so much more severe than under the old provisions, the former decisions construing this law are no longer applicable, and that the defendant should now be entitled to a jury trial as a matter of right.
>
> The constitutional provision for a jury trial (Article I, Paragraph 2) is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever * * *."
>
> This section has reference to a trial by a common-law jury of twelve men (*People* v. *Cosmo,* 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People* v. *Justices of Court of Special Sessions,* 74 N. Y. 406) and has been in force since 1777. Courts of Special Sessions have existed since 1744 to the

present time, but no jury was permitted in these courts until 1824, when the *Legislature* provided for a jury of *six* (*People* v. *Justices of Court of Special Sessions,* 74 N. Y. 406), so that any right that a defendant may have to a jury trial in a court of Special Sessions is statutory, and not constitutional, and hence, in the absence of statutory provisions therefor, the defendant is not entitled to a jury trial as a matter of right.

In the case of *Duffy* v. *The People,* 6 Hill's Rep. 75, the Court of Errors of the State of New York passed upon the constitutionality of an Act passed in 1833 punishing a husband or parent who abandoned his wife or children in the State of New York without adequate support. Duffy was convicted by the court without trial by jury. The court, in sustaining the conviction, said (p. 78):

> The Constitution does not require an indictment in all criminal cases; or even for all crimes which are infamous in their character. For the crime of petit larceny, which was always considered as infamous, is expressly excepted from the section of the 7th Article of the Constitution, which requires an indictment for capital offences, and all infamous crimes. Nor does the Constitution require a trial by jury in every case of a criminal nature. The provision of the Constitution on that subject is, that the trial by jury in all cases in which it had been used at the time of the adoption of the new Constitution, should remain inviolate forever.

(Const. Art. 7). A provision substantially in the same form was contained in the former Constitution of this state but the statutes of the colony, previous to the adoption of the old Constitution, and the statutes subsequently thereto, expressly authorized the trial of petit larceny, and offences not infamous in their character, under the degree of grand larceny, without indictment, and without a jury, where the accused neglected to give security to appear at the next Court of General Sessions. (See Colonial Act of 1st Sept. 1744, and 1 Greenl. Laws N. Y. 422; 2 R. L. of 1813, p. 504, 507.) And the first law authorizing a trial by jury in any case, in a Court of Speeial Sessions, for such offences, was passed subsequent to the adoption of the present Constitution.

In Matter of Cooley v. *Wilder,* 234 App. Div. 256, the Court sustained a sentence of six months in jail where trial by jury was not allowed the defendant. See also *People* v. *Stein* (1903), 80 App. Div. 357.

In *Byers and Davis* v. *Commonwealth* (1862), 42 Pa. St. 89, an act authorized the mayor or police magistrate to try a professional thief or pickpocket who frequented designated places for an unlawful purpose and if he were found guilty to commit him to hard labor in the county jail for not more than ninety days. The defendants were tried without a jury, were convicted, and were sentenced to hard labor in jail for ninety days. The act was sustained. See especially pages 94 to 96.

In the case of *State* v. *Rodgers,* Court of Errors and Appeals (1917), 91 N. J. L. 212, the defendant was convicted of operating an automobile while under the influence of intoxicating liquor. His demand for a jury was denied. The sentence was thirty days in jail, but the Act provided penalties of not more than $500 or not less than thirty days nor more than six months. The Court sustained the conviction and held that the offense was not indictable at common law. In *Katz* v. *Eldridge* (1921), 97 N. J. L. 123, the defendant, convicted of violation of the state prohibition law, was denied a trial by jury. The Act provided penalties of not more than $500 or six months or both. This was held to be a petty offense triable without a jury, although the conviction was reversed on other grounds.

In *Wilmarth* v. *King,* 74 N. H. 512; 18 L. R. A. (N. S.) 398 (1908), the defendant was imprisoned for four months, upon conviction by a justice of the peace, for drunkenness. The maximum punishment authorized by statute was six months. By state statute justices of the peace were empowered to hear and determine any prosecution or action of a criminal nature arising within his county where the punishment was by imprisonment not exceeding six months. In sustaining this conviction, the Court said:

> * * * statutes authorizing the punishment of six months' imprisonment by a justice of the peace are to be found, even

> antedating the Constitution. * * * it is impossible to say as a matter of law that imprisonment for six months is more than an equivalent for the barbarous punishment of public whipping and setting in stocks, * * *. The presumption is that the legislature intended to obey the Constitution * * *. This involves a legislative finding that the corporal punishment of deprivation of personal liberty for six months does not exceed the like punishment of whipping or setting in stocks directly inflicted upon the person.

See *Ex Parte Wilson, supra,* where this Court observed a comparison by Congress of thirty lashes and six months imprisonment in establishing the jurisdiction of the District Courts over offenses against the United States.

The case of *Frank* v. *United States* (1911) C. C. A.—6th Circuit, 192 Fed. 864, 868, is the only decision of the Federal Courts petitioner has been able to find bearing upon this subject. There the defendant was tried for violation of the Federal Food and Drug Act, and the Court agreed, upon stipulation of counsel, that since the Act provided for a penalty of $200 only, the violation was a petty offense.

IV

THE LICENSE LAW IS IN THE NATURE OF A MUNICIPAL ORDINANCE AND CONGRESS HAS PROPERLY TREATED A VIOLATION OF THE LAW AS A PETTY OFFENSE

The License Act, approved July 1, 1902 (32 Stat. 622), as amended by the Act approved July 1, 1932,

(47 Stat. 550), was provided for originally in an Appropriation Act for the District of Columbia. Violations of the law are not included as offenses in a criminal statute. It deals simply with local conditions, is designed to provide revenue and to insure the regulation of certain occupations and businesses by local municipal authorities. During the fiscal year 1934 approximately four hundred persons were charged with violations of this Act, and, in 1935, more than three hundred and eighty such violations were charged. In addition, there are many charges of violations of regulations promulgated by the Commissioners of the District of Columbia under authority of the Act. More than seventy forms of businesses, trades, occupations and professions in the District of Columbia are required to be licensed under its provisions. Violations may be punished by a fine not exceeding $300 or by commitment not exceeding ninety days.

For offenses not triable by jury under the Constitution, Congress, by enactment of the Act of March 3, 1925 (43 Stat. 1119), supra, has provided trial by jury where the penalties exceed $300 or ninety days. Where the penalties for such offenses do not exceed $300 or ninety days, summary trial is prescribed. There can be no question that Congress may prescribe summary trial for petty offenses. In *District of Columbia* v. *Colts,* 282 U. S. 63, 72, this Court said:

> That there may be many offenses called "petty offenses" which do not rise to the de-

> gree of *crimes* within the meaning of Article III, and in respect of which Congress may dispense with jury trial, is settled.

One of the decisions cited by the Court in support of this statement is *State* v. *Rodgers,* 91 N. J. L. 212, 214, in which case the State Court sustained a conviction, by a magistrate without a jury, for driving an automobile while under the influence of intoxicating liquor, under a State law which established maximum penalties of $500 or six months for the offense.

In the opinion of the lower Court it appears to be conceded that the offense here is within the class termed "petty offenses", both as to its nature and the punishment which may be imposed.[1] Therefore, in the light of the procedure at common law, it follows that Congress has, by a valid and constitutional enactment, properly characterized a violation of the License Law as a petty offense.

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[1] The offense with which we are here concerned is the breach of a municipal ordinance. It is an offense which, if known to the common law, was certainly regarded as petty—an offense to which there is not attached any of the elements of moral turpitude. There is, therefore, nothing in the "nature of the offense" by which it may be characterized as a crime. It is of that class of cases described by Mr. Dillon in his work on Municipal Corporations (Vol. 1, Sec. 433), as falling within the description of municipal police regulations and which relate to acts and omissions not embraced in the general criminal legislation of the state. Such acts and omissions were regarded as innocent, or at least as trivial, one hundred and fifty years ago. Obviously, therefore, the doing of business without the payment of a license tax was not a crime within the contemplation of the makers of the

V

THE ABSENCE OF AN ABSOLUTE RIGHT OF APPEAL DOES NOT AFFECT THE RIGHT OF TRIAL BY JURY

The United States Court of Appeals based its decision upon the extent of punishment which may be imposed, laying stress upon the fact that appeal from the Police Court is not a right but exists only by writ of error issuable in the discretion of the Appellate Court (R. 27). The Court concluded (R. 27, 28):

> For these reasons, we are of opinion that the constitutional provisions with relation to jury trial apply, first, in all cases—*especially in all cases where as here there is no election of right and no appeal of right*—in which the offense charged was an indictable offense under the common law, without regard to the measure of punishment; and, second, in all cases, without regard to the nature of the offense, where the punishment which may be inflicted under the statute in-

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Constitution or the people of the Colonies at the time of the adoption of the Constitution (R. 26).

* * * if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitution, the conviction would likewise have to stand; for the most casual examination of the history of the English criminal law from the time of James I to the time of our Revolution—and, as well, the history of criminal procedure in most of the American Colonies—shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon (R. 24).

volves a sentence as severe as confinement in jail for ninety days. [Italics supplied.]

This Court has repeatedly held that a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law (*McKane* v. *Durston,* 153 U. S. 684, 686; *Andrews* v. *Swartz,* 156 U. S. 276; *Murphy* v. *Massachusetts,* 177 U. S. 155). It is presumed that the appellate court will grant a writ of error in a proper case, thus insuring the defendant a review in cases where error is brought to the attention of the appellate court.

In the case of *State* v. *Loden,* 117 Md. 373 (1912), the Court sustained a statute which empowered police magistrates to try without a jury violations of a license law where no right of appeal was provided. See especially pages 385 and 386.

VI

THE OPINION OF THE LOWER COURT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

In the opinion of the United States Court of Appeals it is conceded that this offense, if known to the common law "was certainly regarded as petty", and that "if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitutiton, the conviction would likewise have to stand; for

the most casual examination * * *" of the English and Colonial history of criminal law "* * * shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon". But it was said that "time works changes and brings into existence new conditions and purposes;" that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth", and that in construing the provisions of the Constitution with respect to the guaranty of trial by jury "the practice at the time of the adoption of the Constitution is not the only factor to be considered." However, this Court, in *Dimick* v. *Schiedt*, 293 U. S. 475, 487, said:

> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States*, 290 U. S. 371. *But here, we are dealing with a constitutional provision* (7th Amend.) *which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.* To effectuate any change in these

> rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124. [Italics ours.]

And in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 669, it was observed:

> Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power * * *, though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, *the best examples of which, perhaps, are the Sixth and Seventh amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted. Patton* v. *United States*, 281 U. S. 276, 288, and cases cited. See, also, *Callan* v. *Wilson*, 127 U. S. 540, 549; *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 487; *West* v. *Gammon*, 98 Fed. 426.

VII

CONCLUSION

It is, therefore, respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia should be reversed.

ELWOOD H. SEAL,
Corporation Counsel, D. C.
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.
RAYMOND SPARKS,
Assistant Corporation Counsel, D. C.

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